IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15559 of 2003
with
SPECIAL CIVIL APPLICATION No. 174 of 2004

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

Dr. K N PATEL & Ors.
Versus
V A SATHE

Appearance:
1. Special Civil Applications Nos. 15559/2003 & 174/2004
MR PARESH UPADHYAY for Petitioners
MR SN SHELAT Advocate General with
MS SHRUTI D TRIVEDI AGP for Respondents

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
Date of decision: 05/11/2004

ORAL JUDGEMENT

Heard the learned advocates.

The petitioners in these two petitions preferred under Article 226 of the Constitution of India are the Doctors in Class-I Service of the Government of Gujarat. The petitioners challenge the appointment of the concerned respondent no.1-IAS Officers as Commissioner of Health, Medical Services & Medical Education being contrary to the recruitment rules. The petitioners seek writ of quo warranto against the said respondents.

By Government Notification dated 4th July, 2002 Shri V.A Sathe, an IAS Officer, the respondent no. 1 in Special Civil Application No. 15559 of 2003 was appointed as Commissioner of Health, Medical Services & Medical Education. The said appointment has been challenged in Special Civil Application No. 15559 of 2003. Pending the said petition, by Notification dated 28th December, 2003, the said Shri Sathe was replaced by Shri Amarjit Singh, an IAS Officer; the respondent no. 1 in Special Civil Application No. 174 of 2004. Feeling aggrieved, the concerned petitioners have preferred Special Civil Application No. 174 of 2004 and has prayed for a writ of quo warranto.

Learned advocate Mr. Upadhyay has submitted that by Government Resolution dated 20th December, 1988 the erstwhile post of Director-Health, Medical Services & Medical Education was redesignated as Commissioner, Health, Medical Services & Medical Education [hereinafter referred to as, "the Commissioner"]. The appointment to the post of Director was and now to the post of Commissioner is governed by the Director of Health, Medical Services & Medical Education [Recruitment] Rules, 1984 [hereinafter referred to as, "the Rules of 1984"]. The Rules of 1984 has been made by the Governor of Gujarat in exercise of powers conferred by the proviso to Article 309 of the Constitution of India. The Rules of 1984 is, therefore, statutory in nature. Mr. Upadhyay has submitted that the Rules of 1984 provides for appointment to the post of Commissioner by transfer or by promotion or by direct selection. In any case, the candidate concerned is required to possess a Post Graduate Degree in any branch of Medical Education. Hence, a medical person alone can be appointed to the post of Commissioner. The State Government has, by impugned Notifications, appointed IAS Officers who admittedly do not possess the required medical qualification or experience. The said two respondents, therefore, have no right or authority to occupy the post

of the Commissioner. He has further submitted that the State Government has acted smart and has, pending the Special Civil Application No. 15559 of 2003, appointed Shri Amarjit Singh in place of Shri V.A Sathe so that the said Special Civil Application No. 15559 of 2003 becomes infructuous. The State Government has thus tried to overreach the process of the Court. In support of his contention, Mr. Upadhyay has relied upon the judgment of this Court in the matter of K.D Vohra v. Kamleshbhai Gobarbhai Patel [2003 (2) GLR 1343].

The petition is contested by the learned Advocate General Mr. S.N Shelat. He has submitted that under the All India Services Act and the Rules & the Regulations made thereunder, the post of the Commissioner has been declared to be a Cadre Post. A Cadre post cannot be filled in by appointment of any person other than an IAS Officer. The appointment of the concerned respondent no. 1 Shri V.A Sathe and Shri Amarjit Singh is, therefore, in consonance with the relevant rules and a writ of quo warranto shall not be maintainable against the said respondents. He has submitted that in view of Section 14 of the Administrative Tribunals Act, 1985 it is the Central Administrative Tribunal which has exclusive jurisdiction to entertain and try the grievance of the petitioners. The petition under Article 226 of the Constitution shall not be maintainable. Mr. Shelat has relied upon entry no. 70 of the Union List and entry no. 41 of the State List under Seventh Schedule of the Constitution of India. He has submitted that the Parliament alone has jurisdiction to make legislation in respect of All India Services. He has relied upon the judgments of the Hon'ble Supreme Court in the matters of D. Rudriah & Anr. vs. The Chancellor, University of Agricultural Sciences, Bangalore & Ors. [AIR 1971 Mysore 84]; of J. Ranga Swamy v. Government of Andhra Pradesh & Ors. [AIR 1990 SC 535] and of High Court of Gujarat & Anr. vs. Gujarat Kishan Mazdoor Panchayat & Ors. [AIR 2003 SC 1201].

In answer, learned advocate Mr. Upadhyay has relied upon the Indian Administrative Service (Cadre) Rules, 1954, particularly Rule 9 thereof. Sub-rule (1) of the said Rule 9 provides that, "..A cadre post in a State shall not be filled by a person who is not a cadre officer except in the following case, namely :-

(a) if there is not suitable cadre officer available for filling the vacancy :

Provided that when a suitable cadre

officer becomes available, the person who is not a cadre officer, shall be placed by the cadre officer."

He has submitted that the above rule implies that a cadre post is required to be filled in by a suitable cadre officer. He has submitted that being a cadre officer in itself does not make a cadre officer suitable for any cadre post. The post of the Commissioner which was hitherto filled in by an officer having medical qualifications cannot be filled in by a cadre officer having no medical qualifications. Appointment of such officer would contravene the rules of the Medical Council of India.

In the matter of K.D Vohra vs. Kamleshbhai Gobarbhai Patel [Supra], the Hon'ble Division Bench of this Court has considered the enforceability of rules made under the proviso to Article 309. It has been held that, "..The Rules made under the proviso to Art. 309 regulating the recruitment and conditions of services of persons appointed to such services or posts will operate with full force, subject to the provisions of the Constitution or any Act made by the appropriate Legislature, as contemplated by Art. 309. Apart from this limitation and in the absence of any Act of the appropriate Legislature on the matter, the Rules will have full effect and must be enforced." In the matter of D. Rudriah & Anr. [Supra], the Hon'ble Supreme Court has discussed scope of writ of quo warranto. The contention that, "..a person who is not an aspirant and eligible, for the office of the Vice-Chancellor but comes before Court only as a relator asking for issue of a writ in the nature of quo warranto, can only ask the court to examine whether the statutory provisions under which the holder of a public office is appointed or elected, have been complied with and that he (such petitioner) cannot question the validity of the law under which such appointment is made or such election is held." In the matter of High Court of Gujarat & Anr. [Supra], the Hon'ble Supreme Court has held that, "..The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for issuance of writ of certiorari." In the matter of J. Ranga Swamy [Supra], it has been held that, "..It is not for the Court to consider the relevance of qualifications prescribed for various posts. ....It is not for us to assess the comparative merits of such a doctorate and the BARC

diploma held by the petitioner and decide or direct what should be the qualifications to be prescribed for the post in question."

Entry No.70 in the Union List under the above referred Seventh Schedule relates "Union Public Services; all-India Services and Union Public Service Commission". Entry No. 41 of the State List under the above referred Seventh Schedule relates "State Public Services; and State Public Service Commission." There is no dispute that the Parliament shall have exclusive right to legislate in respect of the All India Services and the State Legislature has exclusive right to enact in the matter of State Public Services. In exercise of the said power, the Parliament has enacted the All India Services Act, 1951 [hereinafter referred to as "the Act of 1951"]. Section 3 of the Act of 1951 empowers the Central Government, after consultation with the Government of the State concerned, to make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All India Service. Sub-section (2) thereof provides for the procedure to lay every rule made by the Central Government and every regulation made under or in pursuance of any such rule before each House of Parliament. It further provides that, "..if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in such rule or regulation or both Houses agree that such rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation." In exercise of the aforesaid power, the Central Government has made the Indian Administrative Services [Cadre] Rules, 1954 [hereinafter referred to as, "the Rules of 1954"]. Under Rule 1.2 thereof, the right to take a final decision regarding inclusion of the post in the cadre vests in the Central Government. Rule 8 thereof provides that, "every cadre post shall be filled by a Cadre Officer". Rule 4 thereof empowers the Central Government to make regulations for determination of the strength and composition of each of the cadres constituted under Rule 3 of the said Rules. In exercise of the said power, the Central Government has made the Indian Administrative Service [Fixation of Cadre Strength] Regulations, 1955 [hereinafter referred to as, "the Regulations"]. The Government of India has, by Notification dated 4th November, 1999 made the Indian Administrative Service [Fixation of Cadre Strength]

Seventh Amendment Regulations, 1999. By the said amendment, the Schedule to the Regulations has been amended to include, inter alia, the post of Commissioner of Health, Medical Services & Medical Education. In other words, by the said amendment, the post of the commissioner has been converted to be a Cadre Post. As the Cadre Post is required to be filled in by appointment of an All India Administrative Service Cadre Officer, the concerned respondent no. 1 has/had been appointed as the Commissioner.

Rule 2 of the Rules of 1984 reads as under :-

"Appointment to the post of Director of Health & Medical Services & Medical Education shall be made either-

(a) by appointment of Additional Director of Medical Education and Research or Additional Director (Inspection), Health & Medical Services or Director of Employees State Insurance Scheme, or

(b) by promotion from amongst persons of proved merit and efficiency holding office as joint Director or Deputy Director in Health and Medical Services or Medical Education, or as Dean of a Medical College or a Superintendent of a teaching hospital attached to a medical college, who possess academic qualification and experience and who have not less than three years experience as Joint Director or Deputy Director or Dean or Superintendent, or

(c) by direct selection."

Rule 3 thereof provides for qualifications required for appointment to the post of the Commissioner by direct selection. There is no dispute that the Rules of 1984 requires that a person appointed as the Commissioner shall be a medical person possessing atleast Post Graduate qualification.

The question that falls for my consideration is whether the Rules of 1984 shall prevail or shall the Regulations prevail. In the submission of Mr. Upadhyay, Rules of 1984 are statutory rules made in exercise of

power conferred by proviso to Article 309 of the Constitution. The rules of 1984, therefore, shall have statutory force and shall prevail over the Regulations made under the Rules of 1954 made under the enactment of the Parliament.

I am unable to agree with Mr. Upadhyay. It is well-settled that the rules or the regulations made under an enactment are part of such enactment. Hence, in my view, the rules or regulations made under the Act of 1951 shall be considered as part of the Act of 1951 and shall have the same enforceability as the provisions contained in the Act of 1951. In otherwords, the Rules of 1954 and the Regulations are part of the Act of 1951, a legislation enacted by the Parliament. Article 309 of the Constitution of India reads as under:-

"309. Recruitment and conditions of service of persons serving the Union or a State -

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in this behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

Thus, it is the Parliament or the State Legislature; as the case may be, which is empowered to make enactment to regulate the recruitment of and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of that State. In absence of such enactment, the proviso to the said Article empowers the President or the Governor of the State to make rules regulating the

recruitment of and conditions of service of the persons appointed to such service and posts until provision in that behalf is made by appropriate legislation. Hence, the rules made in exercise of the power conferred by the said proviso shall be effective until the enactment is made by the appropriate Legislation. Moment such enactment is made by the Parliament/the legislature, the effect of the rules shall be subject to the provisions of such enactment. The rules in so far as are contrary/repugnant to the enactment, shall lose its efficacy. In the present case, on conversion/encadrement of the post of the Commissioner, the recruitment to the said post shall be governed by the Act of 1951. The applicability of the Rules of 1984 made under the power conferred by the proviso to Article 309 of the Constitution of India shall be subject to the Act of 1951. As the Act of 1951 and the Rules of 1954 made thereunder require that a cadre post shall be filled in by appointment of a Cadre Officer alone, the action of the State Government in filling the post of the Commissioner by appointment of an IAS Officer cannot legitimately be questioned. Nor the concerned Officer can be said to have held the post of the Commissioner without the authority of law. In other words, no writ of quo warranto shall issue against the concerned respondent no. 1. It should also be noted that the above referred Notification dated 4th November, 1999 is not the subject matter of challenge before me.

The contention that a cadre officer also shall be suitable to hold the post of the Commissioner and the concerned respondent cannot be said to be suitable to hold the post of Commissioner requires to be rejected. The fact that the post of the Commissioner is declared to be a cadre post would imply that the post of the Commissioner is required to be filled in by an officer having administrative qualifications rather than medical qualifications. The functions of the Commissioner have been brought on the record of the matter by the State Government. It indicates that the functions of the Commissioner are administrative in nature, requiring control over the entire department consisting some 35,000 employees with annual budget of Rs.600 to Rs.700 Crores and also to deal with service matters from recruitment to retirement, including promotions, vigilance cases, disciplinary proceedings, etc. Considering the functions to be performed by the Commissioner, if the Union Government in consultation with the State Government had thought it fit to encadre the post of the Commissioner, it cannot be said that a cadre officer without the medical qualifications would not be suitable to hold the

post of the Commissioner.

The contention that the Administrative Tribunal constituted under the Administrative Tribunals Act, 1985 alone shall have jurisdiction to entertain and decide the matters at dispute requires to be rejected as in the present petitions, the petitioners have prayed for writ of quo warranto and no other relief.

In view of the above discussion, both these petitions fail. The petitions are dismissed. Rule nisi issued in each petition is discharged. There shall be no order as to cost. The Registry shall maintain copy of this judgment in each petition.

{Miss R.M Doshit, J.}

Prakash*